IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

NO. 462

MRS. JOHN FAIN, et al
C. W. DUNCAN, Administrator of the Estate of
Mrs. T. H. Duncan, Deceased,
Petitioners,

v.

W. RAY DUNCAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INDEX

Citations to Opinions Below 2
Jurisdiction 2
Questions Presented 2
Constitutional Provision Involved 3
Statement of the Case 3
Reasons for Granting the Writ 5
Argument 6
I. Appellate Power to Review Facts 6
II. The Erie Doctrine 10
Conclusion 11
Appendix 12
Trial Court's Opinion, October 10, 1963 12
Opinion, United States Court of Appeals for the Sixth Circuit, Nos. 17,042 and 17,043, Decided May 4, 1967 13
Order Denying Hearing En Banc, June 13, 1967 25
Order Denying Rehearing, June 13, 1967 26

CITATIONS

Cases:

Aetna Life Ins. Co. v. Ward, 140 U.S. 76 (1891) 7
Berner v. British Commonwealth Pacific Airlines, Ltd., 346 F. 2d 532, 541-42 (2nd Cir. 1965) 8
Detroit Taxicab & Transfer Co. v. Pratt, 2 F. 2d 193 (6th Cir. 1924) 7
Driver v. Smith, 47 Tenn. App. 505 (1959) 10
Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) 6, 10
Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 481 (1933) 6, 7

Guaranty Trust Co. v. New York,
326 U.S. 99, 109 10
Lind v. Schenley Industries, Inc.,
278 F. 2d 79 (3rd Cir. 1960) 8
Neely v. Martin K. Eby Construction Co.,
386 U.S. 317, 87 S. Ct. 1072 (1967) 10
Neese v. Southern R. Co.,
350 U.S. 77 (1955) 8
New York, L.E. & W.R. Co. v. Winter,
143 U.S. 60 (1892) 7
Tennant v. Peoria & P.U.R. Co.,
321 U.S. 29, 35 (1944) 9
United States v. Johnson,
327 U.S. 106, 111 (1946) 7
United States v. Socony-Vacuum Oil Co.,
310 U.S. 150, 247 (1940) 7
Virginian R. Co. v. Armentrout,
166 F. 2d 400, 409 (4th Cir. 1948) 7
Whitley v. Hix, 207 Tenn. 683, 693 (1961) 10

Statutes:

28 U.S.C. §1254(1) 2
28 U.S.C. §1332 3
28 U.S.C. §1441 3

Miscellaneous:

Barron & Holtzoff, Federal Practice & Procedure, (Wright ed. 1958) §1302.1, p. 349 ..... 7, 8
3 Blackstone, Commentaries on the Laws of England *388 (1779) 7
1961 Duke L.J. 308 8
6 Moore, Federal Practice (1965) ¶5908[6](4), p. 3829 8
13 Stan. L. Rev. 383 (1961) 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

NO. .....

MRS. JOHN FAIN, and
C. W. DUNCAN, Administrator of the Estate of
Mrs. T. H. Duncan, Deceased,
Petitioners,

vs.

W. RAY DUNCAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The above named petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit entered against them and in favor of the above-named respondent in companion cases on May 4, 1967, and adhered to on petition for rehearing by orders entered June 13, 1967.

CITATIONS TO OPINIONS BELOW

The brief oral opinion of the District Court from the bench in granting the motion for a new trial [80a][1] is unreported and is printed in the Appendix hereto, *infra*, p. 12. The opinion of the Court of Appeals, 377 F. 2d 41, had not yet been reported when this petition was prepared and is printed in the Appendix hereto, *infra*, pp. ~~16-26~~. 13-24. [See slip opinion stapled to fourth unnumbered page of certified proceedings.]

JURISDICTION

The judgments of the Court of Appeals were entered May 4, 1967 [second and third unnumbered pages of certified proceedings]. Rehearing, *en banc* and by the original panel, was denied by orders entered June 13, 1967 [fifth and sixth unnumbered pages of certified proceedings], *infra*, pp. 25-26.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals exceeded its powers, as limited by the Seventh Amendment to the Constitution of the United States, by re-examining facts tried by jury and reversing the trial judge's ruling that the first jury verdict was contrary to the great weight of the evidence.

---

[1] Bracketed numbers followed by the small letter "a" refer to pages in the certified copy of the appellant's appendix in the court below and those followed by the small letter "b" refer to pages in the appellees' appendices. References to other portions of the certified record will be by description for lack of pagination.

2. Whether the Court of Appeals assumed an unconstitutional power in disregarding the Tennessee law of *res ipsa loquitur* in determining that the trial judge abused his discretion in setting aside the verdict as against the weight of the evidence.

CONSTITUTIONAL PROVISION INVOLVED

The second clause of the Seventh Amendment provides that:

> ". . . no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

These are two companion cases originally brought under the common law of Tennessee August 8, 1960, in the Circuit Court of Davidson County, Tennessee, seeking damages for personal injuries suffered in an automobile accident April 26, 1960 [3a, 7a-8a]. The respondent, as defendant, removed the cases to the United States District Court for the Middle District of Tennessee [1a] on grounds of diversity of citizenship, which appeared on the face of the original declarations [3a, 7a]. The court had jurisdiction under 28 U.S.C. §§ 1332, 1441.

The following facts were proved without controversy on the trial: The plaintiffs[2] were riding with the defendant

---

[2]For clarity, the petitioner, Mrs. Fain, and the intestate of the petitioner, Duncan, will be referred to as the plaintiffs, and the respondent will be referred to as the defendant, as they appeared in the original pleadings. The original plaintiffs were the defendant's mother, Mrs. T. H. Duncan, and his mother-in-law, Mrs. Fain. Mrs. Duncan died before the first trial from causes unrelated to the accident, and the petitioner, Duncan, was substituted. An issue as to the right of substitution was decided adversely to the defendant, and preserved on appeal. The Court of Appeals did not reach this issue, however.

and his wife from the defendant's home in Tuscaloosa, Alabama, to the plaintiffs' homes in Hohenwald, Tennessee, in the defendant's automobile [36a, 46a] along a route the defendant and his wife had traveled before [50a]. In rainy weather [38a, 48a, 55a] the automobile approached a bridge 8-1/2 miles north of Lawrenceburg, Tennessee, on a dangerous half-mile stretch of curving, two-lane highway that was marked with "danger" and "slippery when wet" signs [64a-66a]. About 11:40 a.m. [62a] the automobile crashed into the railing of the bridge on the left and improper side of the road [56a, 66a], throwing the three women out of the car onto the creek bank and the defendant into the creek [39a, 51a-53a, 62a].

The defendant's wife and her mother, called as plaintiffs' witnesses, said the defendant was driving the car at the time of the accident [36a, 37a, 38a, 42a, 43a, 48a-49a, 3b, 4b] and that he had been driving 60 to 65 miles an hour [38a, 51a]. The wife said that if he had slowed down any, it was very little [56a] and that they had to return to Tuscaloosa the same day [47a-48a]. The wife said she had driven from Florence, Alabama, to Lawrenceburg, Tennessee, while the defendant slept and that he took over the wheel again at Lawrenceburg because it had begun raining and she didn't like to drive in the rain [48a-49a]. She said the accident happened about 10 minutes later [49a-50a].

The defendant did not testify, although he was present [14b], and he offered no evidence except the testimony of three persons, all directed to the same point: That the defendant's wife had told them immediately after the accident that she had been driving the car [63a, 73a, 77a].

The jury found "that the defendant is not guilty of negligence" [30a].

On motion for new trial, the District Judge ruled from the bench that he thought the verdict was "against the great weight of the evidence, and I set the verdict aside and order a new trial in these cases on that ground" [80a].

After the dismissal of the defendant's appeal from that ruling by order entered June 5, 1964, on grounds of prematurity, the cases were re-tried May 10, 11 and 14, 1965, by a new jury, which returned verdicts for the plaintiffs totaling $45,000.00 on which judgment was entered June 8, 1965 [95a-97a]. After denial of post-trial motions October 28, 1965 [102a-105a] the defendant prosecuted a timely appeal to the United States Court of Appeals for the Sixth Circuit [2a].

On May 4, 1967, the Court of Appeals vacated the verdict and judgment in favor of the plaintiffs, reversed the order granting the plaintiffs a new trial, and ordered the cases remanded with instructions that the verdict and judgment for the defendants be reinstated. [*Infra*, pp. 13-24].

A timely petition for rehearing *en banc* presenting the same questions presented on the present petition, and others, was remanded to the original panel by the court *en banc* and was denied by the panel without opinion. [*Infra*, pp. 25-26].

REASONS FOR GRANTING THE WRIT

The decision below is in conflict with the applicable decisions of this Court with respect to the powers of federal judges to re-examine facts tried by jury and with respect to the applicability of state law in diversity cases.

Both rules are of vital importance to the orderly disposition of billions of dollars worth of claims in and out of court annually. On the faith of them, untold numbers of lawyers advise clients to pay, compromise, abandon or

litigate claims or to appeal or not to appeal judgments.

New guidelines from this Court are obviously needed despite the clarity of Mr. Justice Brandeis's statements of both rules in this Court's leading cases in point, as follows:

1. "The rule that this Court will not review the action of a federal trial court in granting or denying a motion for new trial for error of fact has been settled by a long and unbroken line of decisions . . . . The rule precludes likewise a review of such action by a circuit court of appeals." *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 481 (1933).

2. "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

The first rule had already been rendered uncertain in practice by uneven developments in the various circuits during the two decades since it was last directly re-affirmed by this Court, and the questions thus raised should be settled authoritatively for all circuits.

The second rule is unquestioned and the refusal of the Court of Appeals to apply it so far departed from the settled course of judicial proceedings as to call for exercise of this Court's power of supervision.

ARGUMENT

I. Appellate Power to Review Facts

At the time the Seventh Amendment adopted the "rules of the common law" to define the scope of re-examination of facts tried by a jury, it had been established for nearly 150 years in the English Court of Common Pleas that a ver-

dict loser was entitled to another chance before a new jury "upon the mere certificate of the judge (unfortified by any report of the evidence), that the verdict had passed against his opinion." 3 *Blackstone, Commentaries on the Laws of England* *388 (1779).

The practice of the Common Pleas judges at Westminster in treating the *nisi prius* trial judge's opinion on the weight of evidence as conclusive on motion for new trial has been continued without break by this Court, as shown by the cases cited by Mr. Justice Brandeis in *Fairmount Glass*, *supra*, 287 U.S. at 481, 482, footnotes 3, 4, 7 and 8, and by the subsequent cases of *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 247 (1940), and *United States v. Johnson*, 327 U.S. 106, 111 (1946). These cases have not been overruled.

Generally the courts of appeals likewise refused to review a trial judge's judgment of fact for more than 150 years, but in this century these courts began tacking onto their statements of the rule of non-reviewability a phrase borrowed from other areas of appellate law—"except for an abuse of discretion." See, *e.g.*, *Detroit Taxicab & Transfer Co. v. Pratt*, 2 F. 2d 193 (6th Cir. 1924), where the Court cited two decisions of this Court, neither of which even hinted at such an exception. *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76 (1891); *New York, L.E. & W.R. Co. v. Winter*, 143 U.S. 60 (1892).

Twenty-four years after the *Detroit Taxicab* case, the *dictum* of that case was taken as authority with other similar cases, for a square holding reversing a trial judge for refusing to set aside a $160,000 verdict as excessive. *Virginian R. Co. v. Armentrout*, 166 F. 2d 400, 409 (4th Cir. 1948). Within 15 years, all other circuits had declared they have power to do the same thing and some had implemented it with reversals. See *Barron & Holtzoff*,

Federal Practice & Procedure, (Wright ed. 1958) § 1302.1, p. 349, text and notes at notes 17.20, 17.21, as supplemented.

In the course of this development, this Court granted certiorari once to determine whether the Fourth Circuit had exceeded its powers in reversing a trial court's denial of a new trial motion upon remittitur, but the Court did not reach the Constitutional question because it found the Court of Appeals should not have intervened in that case even if it had the power to do it. *Neese v. Southern R. Co.*, 350 U.S. 77 (1955).

In 1960, the Third Circuit introduced a new expansion of appellate power by reversing a trial court's grant of a new trial on grounds the verdict was against the great weight of the evidence. *Lind v. Schenley Industries, Inc.*, 278 F. 2d 79 (3rd Cir. 1960), cert. denied, 364 U.S. 835 (1960). Judges Hastie and Kalodner dissented sharply from the *en banc* decision, pointing out that that court had "never before reversed an order of a trial judge granting a new trial because of his conclusion on all of the evidence that the jury had reached an unjust result." 278 F. 2d at 91.[3]

Five years later, the Second Circuit followed suit. *Berner v. British Commonwealth Pacific Airlines, Ltd.*, 346 F. 2d 532, 541-42 (2nd Cir. 1965), cert. denied 382 U.S. 983 (1966).

Now, the Sixth Circuit has taken the matter a little further, by declaring a new rule for application by the trial

---

[3] See critical comments on this case in 13 Stan. L. Rev. 383 (1961); 1961 Duke L.J. 308. It is perhaps worthy of note in considering the importance of settling the question that the two leading text authorities appear to be in conflict. Compare 3 **Barron & Holtzoff, Federal Practice & Procedure** (Wright ed. 1958) § 1302.1, p. 350, with 6 **Moore, Federal Practice** (1965), ¶ 5908[6](4), p. 3829.

judge in addition to adopting the new bootstrap power to review the trial judge's action. The new rule to be applied by the trial courts of the Sixth Circuit is that "the jury's verdict should be accepted if it is one which could reasonably have been reached." [*Infra*, p. 18].

The Court below apparently derived this rule from a misinterpretation of a broad statement applied by this Court in reversing the action of an ***appellate*** court in granting a judgment notwithstanding a verdict approved by a trial court. *Tennant v. Peoria & P.U.R. Co.*, 321 U.S. 29, 35 (1944). If the standard declared is allowed to stand, then the trial judge's power to grant a new trial because the verdict is against the weight of the evidence would be governed by essentially the same standard as his power to direct a verdict.

The Court below did not even discuss the Seventh Amendment question although it was directly presented on petition for rehearing.

The Second and Third Circuits likewise had ignored the applicability of the Seventh Amendment, but the petitioner's counsel are not at present informed whether the Constitutional question was raised in those cases.

It is apparent that the courts of appeals will not restrain themselves in this area. If the petitioner and the prior opinions of this Court are right in asserting that the Seventh Amendment precludes review of a trial judge's judgment of the evidence on motion for new trial, the progress of the new doctrine should be stopped now. If the petitioner and the prior opinions of this Court on the point are wrong, then the new doctrine should be extended to all circuits without further uncertainty.

This Court last term delineated in detail the powers of the courts of appeals on appeal from trial court actions

granting and denying motions for judgments n.o.v. *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 87 S. Ct. 1072 (1967).

The closely related question of the power to review motions for new trial on questions of fact is now ripe for decision also.

II. The Erie Doctrine

In the *Erie* case, *supra*, 304 U.S. at 79, this Court declared that it was an "unconstitutional assumption of powers" for a federal court to refuse to apply state law in adjudicating a state-created right under its diversity jurisdiction.

In *Whitley v. Hix*, 207 Tenn. 683, 693 (1961), the Supreme Court of Tennessee squarely held that a guest passenger was entitled to a directed verdict upon proof merely that an automobile controlled by a defendant ran off the left side of a road, injuring the passenger, unless the defendant offered some explanation.

In the present case, the respondent admitted sufficient facts *in his pleading* to have supported a directed verdict for the petitioners under the *Whitley* case. These same facts, and others strengthening the *prima facie* case, were proved on the trial without rebuttal or explanation.

But the Court of Appeals simply ignored state law altogether. It did not cite a single Tennessee statute or decision in its opinion.[4]

The question in this case, therefore, is the same as that considered by this Court in *Guaranty Trust Co. v.*

---

[4]The court below also disregarded Tennessee law relating to automobile owners' liability, which rendered the defendant's evidence in the present case immaterial. See Driver v. Smith, 47 Tenn. App. 505 (1959).

York, 326 U.S. 99, 109: "does it significantly affect the result of a litigation for a federal court to *disregard* a law of a state that would be controlling in an action upon the same claim by the same parties in a state court?" [Emphasis added.]

If the facts would have justified a directed verdict for the plaintiffs upon the same claim in a state court, how could it be an abuse of the trial judge's discretion to grant the plaintiffs the lesser relief of a new trial after a verdict for the defendant?

CONCLUSION

The petitioners respectfully contend that certiorari should be granted to settle both of the important questions of appellate powers and constitutional law presented, to resolve the differences among the circuits on the first question, and in the exercise of this Court's supervisory powers to correct departures from proper procedures in the courts below.

Respectfully submitted,

JACK NORMAN,
SETH NORMAN,
HERBERT R. RICH,
213 Third Avenue North,
Nashville, Tennessee,

Attorneys for the Petitioners.

CECIL D. BRANSTETTER
PHILIP M. CARDEN
216 Third Avenue North
Nashville, Tennessee

Of Counsel

TRIAL COURT'S OPINION[5]

[October 10, 1963]

But I am not too happy with the verdict in view of the evidence in the case. It impressed me during this trial that there was almost overwhelming evidence of negligence on the part of the driver. In fact, I was quite surprised when the verdict came in as it did because I thought there was evidence of negligence.

I am dissatisfied with the verdict. I think it is against the great weight of the evidence, and I set the verdict aside and order a new trial in these cases on that ground.

---

[5] The portion here printed, reproduced at page 80a of the appellant's appendix below, is all that relates to the ground on which the Court of Appeals based its reversal. The full comments of the Court from the bench appear at pages 29b-30b of the appellees' supplemental appendix below.

Nos. 17042 and 17043

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

MRS. T. H. DUNCAN (C. W. DUNCAN, Administrator of the Estate of Mrs. T. H. Duncan, Deceased),
Plaintiff-Appellee,

v.

W. RAY DUNCAN,
Defendant-Appellant.

MRS. JOHN FAIN,
Plaintiff-Appellee,

v.

W. RAY DUNCAN,
Defendant-Appellant.

APPEALS from the United States District Court for the Middle District of Tennessee.

Decided May 4, 1967.

Before: O'SULLIVAN, PECK, and McCREE, Circuit Judges.

PECK, Circuit Judge. These consolidated cases arose out of a single-car accident in Lawrence County, Tennes-

see. The plaintiffs, defendant's mother and mother-in-law, were passengers in defendant's car when it struck a bridge abutment. Personal injury actions were commenced in a Tennessee state court and were subsequently removed to the United States District Court for the Middle District of Tennessee.

The cases were tried to a jury and a verdict finding defendant not guilty of negligence was returned. Upon plaintiffs' motion, the District Court set aside the verdicts and granted a new trial. Defendant's appeal from the order granting a new trial was dismissed by this court in 1964 for want of a final judgment, and after a second trial in which the jury returned verdicts in favor of the plaintiffs, defendant again appeals.

Several points have been raised on appeal, the principal one of which relates to the granting of the new trial. Appellant contends that the district judge acted under a mistake of law, in that he considered the case as a thirteenth juror under the inapplicable Tennessee practice. Appellant further claims that the district judge exceeded, or abused, his discretion in granting the new trial to the extent that he applied an improper legal standard. In support of this contention, appellant apparently relies on statements made by the district judge when ruling on the motion for a new trial.

A brief summary of the facts as developed at the first trial would here be appropriate. Plaintiffs, both residents of Hohenwald, Tennessee, had finished a week-long visit with defendant and his wife in Alabama, and were returning home with defendant and his wife in defendant's car when the accident in question occurred. At approximately 11:00 a.m. on April 26, 1960, and approximately 180 miles from defendant's home, the car in which the four persons were riding went out of control and skidded into a bridge

abutment on the left-hand side of the road. Although the case was presented to the jury on the theory of defendant's negligence, there is no evidence explaining why the vehicle went out of control. The only eyewitnesses to the accident were the passengers in the car, and one of these passengers, Mrs. T. H. Duncan (a plaintiff) died prior to the first trial from causes unrelated to the accident.

The first witness to testify at trial was Mrs. Fain, a plaintiff, who at the time of trial was 91 years old. Mrs. Fain testified that she was sitting on the back seat of the car; that defendant was driving the automobile at the time of the accident and that in going through Lawrenceburg on the way to Hohenwald, the former town being about eight miles from the scene of the accident, it was raining some. Her version of how the accident happened was that "As we was—As Ray drove upon the bridge, why, the crash come." Again on cross-examination, the question was asked: "I believe you said—if I did not misunderstand you—when questioned by [your attorney] that the accident happened just in a flash, that the first thing you knew, it happened and hit the bridge, and that is all you know about the accident?" This witness replied, "That's all I know."

On direct examination, Mrs. Fain stated that the speed of the automobile was "maybe sixty, sixty-five, or something like that." However, this plaintiff also conceded that her husband had never owned a car, that she had never driven one, and that she had no idea how to estimate the speed of an automobile. Finally, this plaintiff admitted that she didn't remember complaining to defendant about the manner or method in which he was operating the car, and when asked if she heard anyone else comment on that subject, she shook her head negatively.

The next witness was defendant's wife, Mrs. Lucille Duncan. Mrs. Duncan testified that defendant was driv-

ing when they started the trip, and drove from Tuscaloosa, Alabama, to Florence, Alabama; that she drove from Florence to Lawrenceburg, Tennessee; and that defendant drove from Lawrenceburg until the time of the crash. She further stated that near Lawrenceburg, she had asked defendant if he would drive because it had begun to rain, and she didn't like to drive in the rain. According to Mrs. Duncan, the extent of the rain was "just showers." When asked how the accident happened, this witness testified "Well, I remember—I think I was looking down in the car because I don't remember seeing the bridge, but I remember seeing my husband raise his foot [from the accelerator] and then the car began to slide." With respect to the speed of the car prior to the accident, Mrs. Duncan stated that "We had been driving about 60 to 65 all the way, and [defendant] hadn't slowed up very much."

On cross-examination, Lucille Duncan was asked whether she had, on the day of the accident, told one Claude Miles (the first arrival on the scene), the patrolman who responded to the scene, and the ambulance driver that she and not defendant had been driving the automobile at the time of the crash. Her respective answers were "I never told anyone I was driving the car," and twice "I never told anyone." All three of these witnesses, called on defendant's behalf, testified that Mrs. Duncan had stated that she had been driving at the time of the accident; both the ambulance driver and Miles recalled that Mrs. Duncan had stated that defendant was asleep when the car struck the abutment and both Miles and the patrolman testified that Mrs. Duncan had stated that she was driving at approximately 50 miles per hour when the crash occurred.

The patrolman further testified that the speed limit on the stretch of road near the point of the accident was 65 miles per hour; that this stretch of road was dangerous;

and that there were danger signs and "Slippery When Wet" signs posted along the road, although the exact location of these signs was not established, and with respect to the last mentioned type of sign, this witness volunteered that he didn't know "whether the driver had access to see it or not."

Defendant did not take the stand and testify.

After the court's charge the jury returned with a verdict finding defendant "not guilty of negligence in the case." Plaintiffs set forth four grounds in the motion for a new trial, one of which was that the jury's verdict was clearly against the weight of the evidence.* At the conclusion of of the oral argument on the motion the trial judge stated from the bench:

> "But I am not too happy with the verdict in view of the evidence in the case. It impressed me during this trial that there was almost overwhelming evidence of negligence on the part of the driver. In fact, I was quite surprised when the verdict came in as it did because I thought there was evidence of negligence.
>
> "I am dissatisfied with the verdict. I think it is against the weight of the evidence, and I set the verdict aside and order a new trial in these cases on that ground."

The order sustaining the motion followed.

In ruling upon a motion for a new trial based on the ground that the verdict is against the weight of the evidence, a district judge must compare the opposing proofs and

---

*The three other grounds set forth by plaintiffs in the motion for a new trial, which grounds ostensibly were not the basis of the District Court's order sustaining the motion, have here been considered and found to be lacking in merit.

weigh the evidence (*Felton v. Spiro*, 78 Fed. 576 (6th Cir. 1897) (Taft, J.), *General Am. Life Ins. Co. v. Central Nat'l Bank*, 136 F. 2d 821 (6th Cir. 1943)), and "it is the duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that the verdict is against the clear weight of the evidence . . . ." *Aetna Cas. & Surety Co. v. Yeatts*, 122 F. 2d 350, 352 (4th Cir. 1941), cited with approval in *Turner v. United States*, 229 F. 2d 944, 946 (6th Cir.), *cert. denied*, 351 U.S. 970 (1956). The power of the trial judge to set aside a verdict as against the weight of the evidence and grant a new trial is thus a check or limitation on the jury's power to render a final and binding verdict, to the end that a miscarriage of justice does not result. However, "courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35 (1944); *Werthan Bag Corp. v. Agnew*, 202 F. 2d 119, 122 (6th Cir. 1953). Thus, while the district judge has a duty to intervene in appropriate cases, the jury's verdict should be accepted if it is one which could reasonably have been reached. In applying these two broad principles defining the permissible limits of court action in granting a new trial on the weight of the evidence, the district judge must, as is generally stated, exercise his sound judicial discretion. See *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940); *Devine v. Patteson*, 242 F. 2d 828 (6th Cir.), *cert. denied*, 355 U.S. 821 (1957), and cases cited infra. See generally 6 *Moore, Federal Practice*, ¶ 59.08 [5] (2d ed. 1953).

Although an order granting a new trial is generally not appealable, it is clear that such orders are reviewable on appeal from the final judgment in the second trial. See *North Texas Producers Association v. Metzger Dairies*,

Inc., 348 F. 2d 189 (5th Cir. 1965), *cert. denied*, 382 U.S. 977 (1966). Indeed, the order dismissing defendant's prior premature appeal stated that "the correctness of the District Court's order would be reviewable, of course, upon an appeal from the final judgment disposing of the case," citing *Ford Motor Co. v. Busam Motor Sales, Inc.*, 185 F. 2d 531 (6th Cir. 1950).

With respect to the applicable scope of review of a District Court decision granting or denying a new trial on the basis of the weight of the evidence, it is well settled that reversal may be predicated only upon an abuse of discretion. *Cutter v. Cincinnati Union Terminal*, 361 F. 2d 637 (6th Cir. 1966); *Southern R.R. v. Miller*, 285 F. 2d 202 (6th Cir. 1960); *accord*, *Mooney v. Henderson Portion Pack Co., Inc.*, 339 F. 2d 64 (6th Cir. 1964); *Werthan Bag Corp. v. Agnew*, 202 F. 2d 119 (6th Cir. 1953); *Spero-Nelson v. Brown*, 175 F. 2d 86 (6th Cir. 1949). *Cf. Trice v. Commercial Union Assur. Co.*, 334 F. 2d 673 (6th Cir. 1964), *cert. denied*, 380 U.S. 915 (1965) ("clear abuse of discretion"); *Turner v. United States*, 229 F. 2d 944 (6th Cir. 1956); *Hunt v. Standard Brands, Inc.*, 72 F. 2d 822 (6th Cir. 1934).

There are few cases where an appellate court has reversed a decision of a district court in either granting or denying a motion for a new trial based on the ground that the verdict was against the weight of the evidence. There is not, however, a complete lack of precedent for such action.

In *Berner v. British Commonwealth Pacific Airlines, Ltd.*, 346 F. 2d 532 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966), following the crash of one of defendant's planes, an action was brought for the wrongful death of one of the passengers. The flight was international and thus liability, if established, was limited to $8,291.87 by the

Warsaw Convention, unless the defendant was guilty of "wilful misconduct." The jury returned a verdict for defendant on all issues and the District Court granted plaintiff's motion for judgment n.o.v. as to liability, holding that the evidence established "wilful misconduct" as a matter of law. The district judge thus granted a new trial on the issue of damages, and also granted a conditional new trial on all issues should the judgment be reversed.

The court of appeals reversed the judgment in favor of plaintiff, stating:

> "We cannot even say that the pilot's or the airline's negligence was established as a matter of law, much less wilful misconduct. Once the case went to the jury, its verdict should not have been upset if reasonable men could find in defendant's favor, as they certainly could here." *Id.* at 538.

In reviewing and reversing the conditional grant of a new trial on all issues, based on the ground that the verdict was against the weight of the evidence, the court stated:

> "We have already held that there was sufficient evidence to go to the jury . . . . To order a new trial on the asserted ground when there was sufficient evidence to go to the jury need not be an abuse of discretion in every case, see 6 Moore, Federal Practice ¶ 59.08 [5], at 3817, 3820 (2d ed.1953), but we find it was in this case. In light of the possible inferences as to what actually happened when the pilot began his let-down, we cannot agree that, viewed in light of the proper standard, the verdict could be called against the weight of the evidence."

The court then reinstated the original verdict in favor of defendant and set aside the judgment entered upon the second jury's determination of $924,396 damages.

In *Lind v. Schenley Indus., Inc.*, 278 F. 2d 79 (3d Cir.) (En banc), *cert. denied*, 364 U.S. 835 (1960), a case procedurally similar to *Berner*, the jury returned a verdict in favor of plaintiff, and the district judge entered judgment n.o.v. for defendant, and conditionally granted a new trial in the event the judgment was reversed. On appeal, the court reversed the judgment and proceeded to review the order granting a new trial. The first ground specified in support of this order, that the verdict was contrary to law, had been disposed of by the ruling on the judgment; the second ground, that the verdict was the result of error in the admission of evidence, was decided in plaintiff's favor. With respect to the one remaining ground, that the verdict was contrary to the weight of the evidence, the court noted:

> "New trials granted because (1) a jury verdict is against the weight of the evidence may be sharply distinguished from (2) new trials ordered for other reasons: for example, evidence improperly admitted, prejudicial statements by counsel, an improper charge to the jury or newly discovered evidence. In the first instance given it is the jury itself which fails properly to perform the functions confided to it by law. In the latter instances something occurred in the course of the trial which resulted or which may have resulted in the jury receiving a distorted, incorrect, or an incomplete view of the operative facts, or some undesirable element obtruded itself into the proceedings creating a condition whereby the giving of a just verdict was rendered difficult or impossible.
>
> * * *
>
> "[W]here no undesirable or pernicious element has occurred or been introduced into the trial and the trial judge nonetheless grants a new trial on the ground that

> the verdict was against the weight of the evidence, the trial judge in negating the jury's verdict has, to some extent at least, substituted his judgment of the facts and the credibility of the witnesses for that of the jury. Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts. It then becomes the duty of the appellate tribunal to exercise a closer degree of scrutiny and supervision than is the case where a new trial is granted because of some undesirable or pernicious influence obtruding into the trial. Such a close scrutiny is required in order to protect the litigants' right to jury trial.
>
> "Where a trial is long and complicated and deals with a subject matter not lying within the ordinary knowledge of jurors a verdict should be scrutinized more closely by the trial judge than is necessary where the litigation deals with material which is familiar and simple, the evidence relating to ordinary commercial practices."

The court concluded that the district judge had substituted his judgment for that of the jury, thereby abusing his discretion, and the case was remanded back with instructions that the original verdict and judgment be reinstated.

The court in ***Fassbinder v. Pennsylvania R.R. Co.***, 322 F. 2d 859 (3d Cir. 1963) (En banç), held that the district judge had erred in failing to give effect to the inference of negligence warranted by the doctrine of ***res ipsa loquitur***, and as a consequence had usurped the function of the jury. And in ***Georgia-Pacific Corp. v. United States***, 264 F. 2d 161 (5th Cir. 1959), the court held the District Court's refusal to grant a new trial to be a clear abuse of discretion where the verdict was found to lack evidenciary support. See also ***Charles v. Norfolk &***

Western Ry. Co., 188 F. 2d 691 (7th Cir.), *cert. denied*, 342 U.S. 831 (1951).

Appellant further contends that "in setting aside the verdict on the basis of his dissatisfaction with it, [the district judge] lapsed into the inapplicable Tennessee practice, considered himself as a thirteenth juror and [thereby] committed a palpable error . . . ." Appellant seems to argue that isolated statements made by the district judge support this conclusion, but they may not properly be so viewed. Rather, those statements may only be considered in context and after having had due regard for the entire record, including particularly the evidence adduced at the first trial. Although a determination of this contention is not essential to the conclusion herein announced, it is observed that the argument is not supported by the record.

Defendant's evaluation of the subject matter of this case as a "prime example of subject matter lying well within the comprehension of jurors" is deemed accurate. The first trial lasted less than two days, and there has been no showing that the jury considered any matter not properly before it. Moreover, plaintiffs' case of negligence against defendant could not be characterized as strong and it is clear that the credibility of plaintiffs' witnesses was in issue. In this respect it must be remembered that, as the court correctly charged the jury, the burden of proof in establishing negligence was on plaintiffs. The jury was not required to impose liability on defendant on the basis of the testimony of his wife and aged mother-in-law, and the jury's verdict in the first trial was, at the very least, a reasonable one. Therefore, on the basis of this record, it cannot be said that the District Court did not clearly abuse its discretion in granting plaintiffs a new trial on the ground that the verdict was against the weight of the evidence.

The fact that the second jury which heard the case returned a verdict in favor of plaintiffs, thus "reinforcing" the decision of the district judge that the verdict for defendant was against the weight of the evidence, is of no significance here. See *Fassbinder v. Pennsylvania R.R. Co.*, *supra*. Even the most inexperienced attorney is aware of the fact that the outcome of any given case depends in large part upon the particular jury hearing it. As was stated in *American Mfgrs. Mut. Ins. Co. v. Wilson-Keith & Co.*, 247 F. 2d 249, 256 (8th Cir. 1957), there with reference to an alleged error of law, "regardless of the different results in the trials, the function of this court is to review alleged errors and if [a party litigant] had become, in due course, vested with a valid judgment, they are entitled to have the action of the trial court which divested them of it reviewed for the alleged manifest error . . . ."

For the foregoing reasons, the judgment in favor of plaintiffs is vacated, the order granting plaintiffs a new trial is reversed and the case is remanded back with instructions that the verdict and judgment in defendant's favor be reinstated.

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

MRS. T. H. DUNCAN, ETC.
Plaintiff-Appellee,

v.

W. RAY DUNCAN,
Defendant-Appellant.

MRS. JOHN FAIN,
Plaintiff-Appellee,

v.

W. RAY DUNCAN,
Defendant-Appellant.

ORDER DENYING HEARING EN BANC

(Filed June 13, 1967)

Before: WEICK, Chief Judge, and O'SULLIVAN, PHILLIPS, EDWARDS, CELEBREZZE, PECK and McCREE, Circuit Judges.

Upon consideration, it is ORDERED that the petition for rehearing en banc be denied and that the petition for rehearing be determined by the panel which decided the appeal.

ENTERED BY ORDER OF THE COURT.

Carl W. Reuss, Clerk

[Caption Omitted]

ORDER

(Filed June 13, 1967)

Before: O'SULLIVAN, PECK and McCREE, Circuit Judges.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT.

Carl W. Reuss, Clerk